the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3] Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law aims at the communicative impact of the speech affected.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws—including expenditure limitations of the kind at issue here. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of

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[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 528 U.S. at 386 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government's justification that is controlling. *Ward*, 491 U.S. at 791.

representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); alteration in original); *see also McConnell*, 540 U.S. at 203-04 (reaffirming compelling interest in preserving citizenry's faith in the electoral process).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by a public perception of the pervasive influence of money in politics. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. International Union United Automobile Workers of Am.*, 352 U.S. 567, 575 (1957).

Additionally, reforms—and expenditure limits in particular—can be justified by a compelling content-neutral interest in preserving the quality of representation by eliminating the burden of raising enormous campaign "war chests." That this burden exists, and has come to dominate

the professional lives of officeholders and candidates is not open to serious question. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

As *amici* can attest, the incessant demands of fund-raising create significant problems for elected representatives seeking to fulfill their professional duties. Elected officials spend so much time raising campaign funds that there is little time left to master issues, communicate with constituents and perform other essential parts of their jobs. In the words of former Representative Vin Weber, "the amount of time people have to put into raising money is a serious problem in the country. . . . There's no way you can prove its impact on the quality of Congress's work . . . . But when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work."[4] This interest is not merely important: it is of a constitutional dimension in its own right. In addition, the necessity of amassing a huge campaign "war chest" creates a strong disincentive to run for office, for both incumbents and challengers.

This problem is the direct result of the absence of limits on campaign spending—and not the result of campaign contribution limitations, as petitioners and their supporting *amici* contend. Candidates simply will not voluntarily put themselves at risk of being outspent by an aggressive opponent. Thus, in a world without contribution limits, the pressure to engage in constant fundraising would remain

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[4]Center for Responsive Politics, *Speaking Freely*, at http://www.crp.org/pubs/speaking/speaking03.html (visited Feb. 7, 2006) (alterations in original).

intense. In any event, petitioners and their supporting *amici* are plainly wrong in their contention that the only constitutionally acceptable way to advance the compelling interest in reducing the time spent fund raising is to eliminate contribution limits. That choice would force legislatures to endure the risk of actual and perceived corruption of the electoral process in order to reduce the incessant demands of fundraising. The First Amendment cannot be read to require such a perverse result.

These justifications for reform address public concerns wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

III. The Court Should Afford Appropriate Deference To Legislative Judgments That Campaign Finance Laws—Including Expenditure Limitations—Are Necessary.

More generally, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance laws. In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). That wisdom applies with particular force in the present context. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 548.

This deference has been applied to laws regulating the electoral process even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the

voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); alteration in original). There, the Court affirmed a campaign reform, even in the face of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is warranted in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to access. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that

donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem [was] not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained.*" *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest). The Court made the same point in *Shrink Missouri.* Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 528 U.S. at 391. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason

to question the existence of a corresponding suspicion among voters." *Id.* at 395.[5]

This deference is appropriate, and should be afforded here. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. And the regime *Buckley*

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[5] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 393-95.

put in place has had the perverse consequence of burdening officeholders and candidates with the ceaseless task of fund-raising to ensure adequate war chests—a burden that is eroding the quality of representative government in this country even as it erodes the public's faith in their elected officials. At the same time, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests on the other side of the balance. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

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NEIL RANDALL, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

WILLIAM H. SORRELL, *et al.*,
Conditional Cross-Petitioners,
v.
NEIL RANDALL, *et al.*,
Conditional Cross-Petition Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND CONDITIONAL CROSS-PETITION RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that participates extensively in national, state, and local elections.[1] The RNC is subject to and complies with applicable rules imposed by the federal and state governments, including Vermont. The RNC has in the past and will in the future support candidates who are subject to the provisions of Vermont's Act 64.

SUMMARY OF ARGUMENT

1. Act 64's presumption that political party independent expenditures primarily benefiting six or fewer candidates are coordinated with those candidates offends the First Amendment for the reasons set forth in *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado I*"). In *Colorado I*, the Court struck down a presumption that political party independent expenditures were coordinated with candidates because such a blanket presumption itself infringes speech, and independent expenditures present no prospect of corrupting the benefited candidate. Moreover, Act 64's presumption offends the Due Process Clause because it reverses the burden of persuasion in a way that punishes speech, sets forth no definitive mechanism for challenging the application of the presumption to a particular expenditure, and fails to guarantee a prompt resolution of any such challenge so that the speech can proceed.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

2. Act 64's scheme of expenditure limitations violates the First Amendment by imposing "direct and substantial restraints on the quantity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The proffered justifications for Act 64 do not withstand strict scrutiny. As explained in *Buckley*, 424 U. S. at 45-46, 47-48, expenditure limits do not correlate to any anti-corruption purpose. Moreover, the asserted interest in protecting the time of incumbent politicians is neither compelling nor related to the imposition of expenditure limits, since much if not most political fundraising by such means as direct mail and the Internet is done with little personal involvement of the candidate, the expenditure limits do not ensure that officeholders will devote more time to their official responsibilities (as opposed to other campaign activities), and the expenditure limits enhance the powers of incumbency. Finally, the expenditure limits are neither narrowly tailored to advance the asserted state interests, nor are they the least restrictive means for doing so, since Vermont has not, unlike many other states, enacted legislation that prohibits fundraising while the legislature is in session. Finally, the suggestion that this Court revisit its precedents holding expenditure limitations offensive to the First Amendment fails to satisfy the threshold requirements for overruling settled precedent.

ARGUMENT

I. ACT 64'S PRESUMPTION OF COORDINATION VIOLATES THE FIRST AMENDMENT AND DUE PROCESS CLAUSE.

Act 64 provides that independent expenditures made by a political party "that primarily benefit[] six or fewer candidates" associated with that party are presumed to be coordinated expenditures on behalf of those candidates. VT. STAT. ANN. tit. 17, § 2809(d). Any coordinated expenditure,